

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JESSE L. GARLES**  
Claimant

VS.

**HALLMARK CARDS, INC.**  
Self-Insured Respondent

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Docket No. 1,012,970

**ORDER**

Claimant requested review of the September 9, 2004 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 1, 2005.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. John D. Jurcyk of Roeland Park, Kansas appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of employment. Consequently, the ALJ denied claimant compensation benefits.

The claimant requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) nature and extent of disability; (3) whether the claimant provided timely notice; and, (4) whether the claimant is entitled medical expenses, including future medical. Claimant argues his accidental injury arose

out of and in the course of employment and that he gave timely notice to the respondent; therefore, he is entitled to a 10 percent functional impairment for his accidental injury.<sup>1</sup>

Respondent argues the claimant sustained an accident at his home on March 25, 2003, which aggravated the claimant's previous low back problems and therefore his condition was not caused by a work-related accident.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a stock handler for respondent. His job duties consisted of bringing components from the warehouse into the packaging lines and unloading them. After the product was finished claimant would then load the product and take it to finished goods. The job required periodic lifting of boxes the entire work day. He alleged a series of repetitive accidents from January 5, 2003 through September 16, 2003. Claimant had intermittent back problems over the years and had occasionally sought medical treatment for those problems. Claimant also worked part-time five nights a week cleaning his attorney's law office.

In March 2003 claimant noticed an increase in the intensity of his back pain. Claimant's job duties had intensified and he was stocking two production lines instead of one. After claimant had finished work on Monday he was a little tired and sore.

When claimant got ready for work on Tuesday morning he noted that he felt fine but as he walked down the hallway at his home his right leg went out from underneath him and he experienced low back pain with a burning sensation which radiated down into his foot. Claimant testified:

Q. And you answered the following, "Well, I had gotten out of bed, went and took a shower, got ready for work. I was feeling fine. Went back to my bedroom, turned off the light. Proceeded to walk down the hallway to leave for work, and my right leg just went out from underneath me, and I had a sharp pain down it. So, basically, starting from my back and then went on down."

A. Yes, sir.

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<sup>1</sup> Claimant returned to his stock handler job for respondent, as a result he is only seeking an award for his functional impairment.

Q. Do you remember telling her that?

A. Yes.

Q. And do you remember telling her that after you got out of the shower and got ready for work you felt fine until you walked down the hall and your leg gave out?

A. Yes, sir.<sup>2</sup>

Claimant notified his supervisor that his back had gone out and although he intended to come in to work he did not think he could perform his job duties. Claimant told his supervisor that his back was sore the night before after work but that he wasn't sure his back pain had anything to do with work.

Claimant sought treatment with Gary Graf, Dr. Toth's nurse practitioner. Claimant was taken off work and called and talked to the respondent's plant nurse, Connie Drake. Claimant asked about applying for workers compensation benefits and was told by the plant nurse that "wear and tear" did not qualify for workers compensation benefits.

Claimant's physician placed him on light duty. Respondent accommodated the restrictions and for a period of time the claimant only worked half days as he received treatment. In June 2003 claimant was released to return to full-duty work. Claimant testified that as he continued working his symptoms worsened. But after released from treatment claimant noted his back had improved from how it felt after the March incident. Finally, claimant complained of ongoing low back pain with occasional mild pain down into his leg.

At the conclusion of the regular hearing, the ALJ indicated that he was going to appoint a physician to perform an independent medical examination of claimant for an opinion whether claimant's work duties aggravated, accelerated or caused his back condition.

Dr. Mary A. Hoffman performed the court ordered independent medical examination of claimant on June 4, 2004. Claimant provided a history of intermittent back pain and noted a severe onset of back pain while getting ready for work. Claimant noted the incident getting ready for work was the first time he experienced pain radiating into the leg.

After reading the claimant's testimony regarding the onset at home of the claimant's back pain which radiated into his leg, the doctor concluded that none of the permanent rating she had provided claimant was related to or caused by his employment with

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<sup>2</sup> R.H. Trans. at 30.

respondent. The doctor testified her rating was based upon claimant's radicular leg pain which was caused by the incident walking down the hallway at his home.

On cross-examination, the doctor equivocated and agreed that some of claimant's condition was contributed to by his work. Dr. Hoffman then concluded that 2.5 percent of her 10 percent rating would be related to claimant's work activities lifting boxes at work. But Dr. Hoffmann agreed that claimant's history of the onset of leg pain first occurred after the fall at home. And Dr. Hoffmann testified her rating was based upon claimant's radicular leg pain:

Q. In your opinion is the totality of your rating based upon the preexisting age-related degenerative conversation [sic] and the aggravation described at page 30 of the regular hearing transcript?

A. No.

Q. What is it based upon?

A. The radicular pain.

Q. Okay. And what - -

A. The leg pain.

Q. And what caused that?

A. Walking down the hallway.<sup>3</sup>

At claimant's attorney's request, Dr. Prostic examined the claimant on December 10, 2003. Dr. Prostic was provided a history that claimant suffered repetitive injuries to his back from handling boxes at work with respondent through March 25, 2003. The doctor opined that claimant had aggravated his degenerative disk disease and developed lumbar radiculopathy. The doctor rated claimant with a 10 percent permanent partial whole person functional impairment. Lastly, the doctor opined that claimant's work aggravated his preexisting degenerative disk disease.

On cross-examination, the doctor admitted that he had not been told about the morning of March 25, 2003, when claimant first experienced the leg pain while walking down the hallway at his home. The doctor agreed that incident would be a competent cause for an aggravation of the preexisting degenerative disk disease. The doctor further

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<sup>3</sup> Hoffmann Depo. at 9-10.

agreed that although there might have been several possible reasons for claimant's leg giving out at home, there was no history of any of those possible causes being work related.

Dr. Prostic testified:

Q. And he's testified in this case that he had intermittent back pain unchanged since he was released by Dr. Delgado in 1991 until this event at home, and you testified previously that the intermittent symptoms probably would not be enough to rate impairment under the guides; correct?

A. Correct.

Q. Assuming that to be true and assuming that he said he woke up asymptomatic in the morning, showered, got dressed and walked down the hall to turn out the light and was asymptomatic until his leg gave way, the totality of your 10 percent impairment for the aggravation of the disease would be attributable to that incident where his leg gave way at home; correct?

A. Yes.

Q. And likewise, your recommendation that he may need medical treatment in the future would be attributable to that event at home, correct, combined with the preexisting degenerative disc disease?

A. Yes.<sup>4</sup>

The claimant testified that he fell at home and that was the onset of his leg pain and worsening back pain. Dr. Hoffmann rated for the leg pain and attributed that to the fall at home as did Dr. Prostic. The Board affirms the ALJ's determination that claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 9, 2004, is affirmed.

**IT IS SO ORDERED.**

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<sup>4</sup> Prostic Depo. at 15.

Dated this \_\_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:     Roger D. Fincher, Attorney for Claimant  
       John D. Jurcyk, Attorney for Respondent  
       Brad E. Avery, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director